United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7457

To be argued by
KENNETH J. FINGER

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

JAMES MORRISSEY,

Plaintiff-Appellant-Appellee,

vs.

NATIONAL MARITIME UNION OF AMERICA,

Defendant-Appellant-Appellee,

and

JOSEPH CURRAN, SHANNON J. WALL and CHARLES SNOW,

Defendants-Appellants.

P/S

BRIEF FOR DEFENDANT-APPELLANT, CHARLES SNOW

KENNETH J. FINGER
Attorney for Defendant-Appellant, Charles Snow
14 Mamaroneck Avenue
White Plains, New York 10601
(914) 949-0308

(8866X)
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----------x

BRIEF ON BEHALF OF DEFENDANT-APPELLANT CHARLES SNOW

This brief is submitted on behalf of defendant-appellant Charles Snow. The points which have been presented in the Core brief on behalf of all defendant-appellants are adopted by by Snow and shall not be included herewith. The preliminary statement and statement of facts will not be repeated except as to certain aspects of the factual situation that specifically refer to Snow's argument herein.

ISSUE

Was the Court below in error in not dismissing the complaint against Charles Snow; in charging the jury on the issues of probable cause and malice; in allowing a judgment against

Snow under the Landrum Griffin Act; and in not reducing the punitive damage verdict against Snow?

The above questions must be answered in the affirmative.

STATEMENT OF FACTS APPLICABLE TO SNOW

Charles Snow, on July 1, 1971 and prior thereto since January 1969, was the security director of the National Maritime Union (447A).* Thereafter as a result of a heart attack and open heart surgery (445A) he went on an extended sick leave. He did not testify at the trial and his testimony was given by deposition.

Snow, a retired police lieutenant in the New York City Police Department, had the responsibility of keeping the peace and order in the hiring hall of the National Maritime Union (455A). He was not an officer of the union and not even a member (450A) and had little independent responsibility. Sometime prior to July 1, 1971, as a result of several incidents, near-fights, punches and arguments (467A), Snow went to an officer of the union and asked that a notice be posted prohibiting the distribution of any literature in the union hiring hall. This notice was authorized by Wall, put out by the National Office and reflected long-standing union

* References are to Joint Appendix.

policy. The only literature that was then distributed in the union hall was the official union publication "The Pilot" and that was only left in a bin -- no one actually handed it out (471A). After the notice was "published" (473A), it was posted (453A) and adhered to. When any persons distributed literature, inciuding the plaintiff James Morrissey, they were asked to distribute the literature outside the union hall and they invariably complied (455A).

On July 1, 1971, plaintiff James Morrissey came into the National Maritime Union hiring hall and started distributing literature. James Nimmo, the Master-at-arms employed by the union, was on duty and asked Morrissey to distribute his literature outside the union hall (334A). He refused to do so. After Nimmo repeatedly requested him to comply with the official notice and not distribute literature inside the union hiring hall Morrissey continued refusing to go outside. Finally, Nimmo called Snow on the phone and asked his advice as to what should be done. Snow told Nimmo again to "do what he was supposed to do, tell him to move outside the door" (453A). He told Nimmo this even before he knew it was Morrissey who was distributing the literature. Snow also told Nimmo to refer Morrissey to the notice on the board

> ". . . put out by the National Office stating no one was supposed to hand out literature other than official literature of the N.M.U. in that hiring hall or in that building at any time.
>
> "I told Jimmy Nimmo to refer Morrissey to that thing and ask him to move outside the building, not to use any force" (453A) (emphasis supplied)

Nimmo called Snow two or three times more and told him that the problem still remained (454A) and asked him what to do. Snow again asked Nimmo to

> ". . . talk to him at the door and asked (sic) him why he persisted in staying when before he had done usually what we had asked him to do and as some others had done for us when we asked them to do" (454A).

When Morrissey continued to refuse to go outside, Snow went to Stanley Gruber, an attorney for the N.M.U. whose offices were located inside the union hall (532A) and told him the following:

> ". . . that Mr. Morrissey was distributing literature downstairs in the hiring hall and that he had been asked several times to stop distributing the literature, but that he was refusing to do so" (526A).

Gruber thereupon told Snow the following:

> "I suggested and advised Mr. Snow that he should continue to ask Mr. Morrissey to stop doing what he was doing, that is, to stop distributing the literature, but that if Mr. Morrissey continued to distribute the

> literature after being requested to stop a few more times, I advised him the best course would be to call the police, and if he refused to stop after the police arrived, to have him arrested" (526A).

Gruber gave this advice as legal counsel (527A).

Snow then told Nimmo to again ask Morrissey to stop. About an hour or an hour and a half after first asking him to go outside to distribute the literature and after talking to the attorney, Snow told Nimmo to advise Morrissey that if he did not keep the peace and if he didn't stop he would be liable to get arrested (457A). Morrissey said that he wouldn't stop and told Nimmo to "do what he wanted" (457A). Snow then told Nimmo to ask Morrissey one more time and, if he refused, to call the police (457A). The police were called; they asked Morrissey to stop; he refused and said "lock me up" (460A) to the police. After conversing with Snow in his office the police took Morrissey to the local precinct where he was issued a summons to appear in court at a later time. The actual charges were first determined by the police and then drawn up by the Assistant District Attorney whose responsibility it was to draft the complaint (414A). On that occasion, he consulted with his superior (260A) and drafted the complaint. He decided which charges were to be brought against Morrissey (294A).

In his experience, if the occasion warranted it, when complainants came into the complaint room, he has told them "there is no case here, why don't you drop it?" (249A). He did not do that here. Nimmo accurately described the incident on July 1, 1971, the layout of the union hall and the union policy and practice about distributing literature (289A).

Thereafter, the legal proceedings took their normal course and the charges were in fact dismissed. Snow had no part in the legal proceedings and only generally asked Nimmo what happened in court (468A).

Prior to the matter arising on July 1, 1971, and prior to the stated date when Snow was employed in 1969, Morrissey had brought an action in federal court to eliminate from the officers' pension plan persons who were not officers (450A). This action was pending at the time of this incident and it was not clear that Snow had even been aware of the action at that time (450A). The district court decision eliminating non-officers from the plan was two years prior to this incident (451A).

ARGUMENT

POINT I

THE COURT ERRED IN NOT DISMISSING THE COMPLAINT AGAINST SNOW IN ITS CHARGE REGARDING ADVICE OF COUNSEL AND PROBABLE CAUSE AND THE ATTENDANT QUESTION OF MALICE IN ALLOWING A JUDGMENT AGAINST SNOW UNDER THE LANDRUM GRIFFIN ACT AND IN NOT REDUCING THE PUNITIVE DAMAGE AWARD AGAINST SNOW.

A. Actual Malice Must Be Proven As An Independent Item of Proof.

As discussed in the core brief, the Court herein erred when it stated that the advice of counsel could not be considered on the issue of probable cause. The Court, in denying the defendant Snow the right to have the advice of counsel considered on the issue of probable cause also erred as to the consideration of the advice of counsel on the issue of malice. By stating that malice could be inferred from the lack of probable cause alone, the Court effectively precluded the consideration of advice of counsel on this issue, irrespective of the other charge of the Court on malice and advice of counsel. Since the jury was allowed to consider that there was probable cause and not consider advice of counsel thereon, and since the jury was instructed that it could then infer malice from

the lack of probable cause alone, the defendant was effectively denied the right to have the advice of counsel considered by the jury on this very important issue of malice. Godfrey v. Medical Society of New York County, 177 A.D. 684, 164 N.Y.S. 846 (2nd Dept. 1917) held that advice of counsel is of substantial weight not only as to the issue of probable cause, but also as to malice.

Malice must be considered as an independent item of proof and element of the intentional tort of malicious prosecution. By stating that the jury herein could infer malice from the lack of probable cause alone, the Court effectively blurred that vital distinction. The Court charged that:

> "If you find that a defendant did not have probable cause for believing plaintiff guilty at the time he initiated or furthered the prosecution, you may, though you're not required to, infer from that fact alone that that particular defendant acted maliciously" (623A).

This charge was error for the aforementioned reason and the cases where this inference was allowed are distinguishable on the basis that there was a wanton and reckless disregard of the rights of the plaintiff in those matters. Munoz v. City of New York, 18 N.Y. 2d 6, 271 N.Y.S. 2d 645 (1966). There was no proof of a wanton and/or reckless disregard of plaintiff's rights by Snow. Rather the evidence conclusively

proves that he acted carefully, with circumspection and only after seeking the advice of counsel and following his instructions to the letter. Thus, the issue of advice of counsel is of great relevance on this issue.

Although the Court correctly charged that the plaintiff must prove both lack of probable cause and malice on the part of each defendant, by stating that probable cause itself could be used to prove malice effectively gave the jury the right to avoid consideration of actual malice. This was error. In the leading case of Munoz v. City of New York, supra, the Court held that the proof of probable cause and malice was for the jury and thus sent the case back for a new trial, but held that probable cause generally turns on the issue of whether the prosecutor acted reasonably in believing the charge was justified with the evidence at hand. By excluding advice of counsel, the Court herein denied the defendants an essential element for the jury to consider in determining if Snow's action was justifiable (18 N.Y. 2d 6, 9).

In stating that the jury could infer, from the lack of probable cause alone, that there was malice, the judge did not follow the established law of New York in requiring independent proof of malice. Weidlich v. Weidlich, 177 Misc. 246, 30 N.Y.S. 2d 326 (1941) held that:

> "So here, if the defendant believed, in good faith, after obtaining legal advice...and was induced to act upon such belief, she is immune to an action for a malicious prosecution. Such is the claim and defense here and necessarily introduces a question of fact" (at 332).

In the instant matter, the jury was deprived of finding on this question of fact by the charge of the Court. The Court, in Weidlich, supra, went on to hold that:

> "'If a party lays the facts of his case fully and fairly before counsel, and acts in good faith, upon the opinion given him by such counsel (however erroneous that opinion may be), it is sufficient evidence of a probable cause, and is a good defense to an action for a malicious prosecution, or for a malicious arrest'. See also, Rawson v. Leggett, 184 N.Y. 504, 512, 77 N.E. 662; Giesener v. Healy, 86 Misc. 16, 147 N.Y.S. 936; Laird v. Taylor, 66 Barb. 139, 143" (at 332).

The instant situation is exactly in point. Even if it can be stated that the advice of the attorney on the validity of the notice was in error, Gruber still advised Snow to call the police and have Morrissey arrested and this all Snow did. He did not call the police and in fact took no action until he consulted the attorney and the attorney advised him to take those actions. As a matter of law no actual malice was proven against Snow.

B. In Order To Be Found To Have Malice, Plaintiff Should Have Been Required To Prove Snow Misrepresented Or Suppressed Facts.

Malicious prosecution requires proof of both lack of probable cause and malice. Judge Gulotta stated that where there was reasonable cause for believing the accused had committed a crime, under the Code of Criminal Procedure, the plaintiff must prove that "defendant misrepresented or suppressed facts which imposed upon and deceived the Magistrate and the Grand Jury" Barnes v. Bollhorst, 215 N.Y.S. 2d, 348, 350 (1961). There was no proof of misrepresentation or suppression of facts herein and Snow acted reasonably, as any security officer would have acted in a similar situation. See also Morgan v. New York Cent. R. Co., 256 App. Div. 177, 9 N.Y.S.2d 339 where a private railroad detective was sued for false imprisonment. Although the Court therein stated that "probable cause" was not an element of the action, "reasonable cause" was and the same rule applies and the plaintiff was required to repel the inference of reasonableness (or probable cause) and prove misrepresentation or suppression.

The Court herein, in allowing the inference, reduced this tort of "malicious prosecution" to "false imprisonment". The Courts have uniformly held that malicious prosecution requires

that the "prosecution is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure (Burt v. Smith, 181 N.Y. 5, 73 N.E. 495, 496), in that order. By allowing the inference of lack of probable cause to be used to prove malice, the requisite proof is negated. Robey v. State, 76 Misc. 2d 1032, 351 N.Y.S.2d 788, (Ct. Claims, 1973) held:

> "Although an officer lacks probable cause to make an arrest and the proceeding ends in claimants' favor, there can be no recovery for malicious prosecution without evidence of actual malice (Schultz v. Greenwood Cemetary, 190 N.Y. 276, 278, 83 N.E.41, 42) and whether malice exists is a question of fact to be proved by the one asserting it (Munoz v. City of New York, citation omitted)."

The Court's charge herein was in direct conflict with the above standard uniformly required by the Courts in New York. Although stating that malice had to be proven, the Court, in stating that malice could be inferred from lack of probable cause effectively held that actual malice was not needed, only implied malice and precluded Snow from having the advice of counsel considered on the question of malice.

In the case of Krafft v. State, 52 Misc.2d 35, 275 N.Y.S. 2d 109 (Ct. Claims, 1966), the Court held, in a case involving a police officer, that "a distinct and essential element

of the cause of action is malice, which must be proved as an independent fact in order for the claimant to sustain his action (36 N.Y. Jur., Malicious Prosecution Sec. 25)" at p. 113.

C. The Proof of Malice Allowed By the Court was Error.

In denying defendant Snow's motion to dismiss at the end of the plaintiff's case, the Court stated that it would allow the jury to consider the testimony about the law suit relative to the pension fund (507A). In so doing, the Court allowed testimony which was not relevant according to the proof and too remote in time to the incident herein to be considered by the jury. It was clear that the District Court decision was in 1969, 2 years prior to this incident. Further, by allowing this as evidence of malice that the jury could consider, the Court, in essence said that if A shoots B, A does not have malice, but B has malice, 2 years later. Here A (Morrissey) took action in bringing a lawsuit against the union that affected B (Snow), the decision on that suit was in 1969, and the Court allowed the jury to infer malice on the part of Snow (not Morrissey who took the action that adversely affected Snow). This, coupled with the Court's allowing malice to be inferred from the lack of probable cause without consideration of the advice of counsel, was in error. In Schanbarger v. Kellog, 43 App. Div. 2d 362, 352 N.Y.S. 2d 50 (3rd Dept. 1974) the Court held that in an action for malicious prosecution, there must be "evidence of ... personal hatred or ill will on the part of the [defendant] ...." No such evidence existed or was proven herein.

D. Plaintiff Should Have Been Required to Prove Snow Guilty of Conscious Falsity.

The Court of Appeals held that malice means "conscious falsity" Munoz, supra (18 N.Y.2d 6,9). There was no proof of conscious falsity in the information given to the police by Snow, rather the evidence leads one to the opposite conclusion.

> "If the apparent facts are such 'that a discreet and prudent person would be led to the belief that a crime has been committed by the person charged, he would be justified, although it turns out that he was deceived, and the party accused was innocent' (Carl v. Ayers, 53 N.Y.14,17). 'One may act on what appears to be true, even if it turns out to be false' (Vann, J., in Burt v. Smith, supra, 181 N.Y. p.6, 73 N.E. p.496)."

Defendant Snow, a security officer, must be held to the same standard as any police officer, or private citizen, acting in a law enforcement capacity. In the Krafft, Schanbarger and Robey cases supra, law enforcement officers were involved and the Courts uniformly required that actual malice be proven, not implied malice based merely upon lack of probable cause, Snow was only an employee of the union and was acting only in this capacity in enforcing its policy. If all security officers are to be held responsible for malicious prosecution when they call the police after receiving

the advice of counsel, no security officer in this country, at a time when security officers are increasingly necessary, will be willing to call the police in the event he reasonably believes a crime is being committed.

E. The Court Below Should Have Dismissed The Complaint Against Charles Snow.

When Snow's action in seeking and following the advice of counsel is considered along with the other proof that he was following the orders of the National Office in seeking compliance with the notice and union policy, and in asking plaintiff many times to go outside the premises to distribute the literature where he could have done so at the very doorstep of the union hiring hall, and in telling Nimmo not to use force, the Court should have determined as a matter of law, that there was no malice and dismissed the complaint regarding punitive damages insofar as it applied to Snow.

F. The Verdict Against Snow Was Excessive In View Of The Lack Of Proof Of Malice.

The record, rather than proving malice, is replete with a lack of malice on the part of Snow. If it is conceded that punitive damages is proper and is to punish, then it must also be conceded that punitive damages is particularly inappropriate

herein. Snow cannot be punished for following his employer's orders, for asking his attorney's advice and following it to the letter, for advising Nimmo not to use any force and for repeatedly asking Morrissey to obey the posted notice. In Douglas v. Tomkins Realty Corporation, 210 N.Y.S.2d 550 (1960), the Court held that:

> "Such [punitive] damages may be awarded in a proper case only where, and to the extent that, the wrongdoer has acted maliciously, wantonly or with a recklessness that betokens improper motive or vindictiveness" at 552.

In light of the above case, and in light of the cases cited in the core brief, the punitive damages in the sum of $30,000 assessed against Snow is clearly excessive. The Court below, in not reducing the award of punitive damages against Snow, committed error. It is basic that an appellate Court has the power to reduce damages where excessive. (See Stone v. Hotel Roosevelt Corp., 7 App. Div. 2d 843, 181 N.Y.S. 2d 561 (1959) where the Court held that damages in excess of $1500 compensatory damages and $2500 punitive damages were excessive and ordered a new trial unless plaintiff agreed to accept such lower amount of damages).

For the reasons and cases cited in the core brief, as well as this brief, the Court herein must reduce the punitive damage award against Snow.

G. Snow Cannot Be Held Liable For Any Acts Under The LMRDA, Sections 411(a)(2) And/or 411(a)(5).

The Court herein affirmed a jury award against Snow on the Landrum Griffin cause of action in the sum of $10,000 for punitive damages arising out of an alleged violation of the plaintiff's rights under Section 411(a)(2) and/or 411(a)(5). Section 411(a)(2) refers to a members right to meet and exchange views subject to the labor organization's right to adopt and enforce reasonable rules and regulations. Section 411(a)(5) refers to "Safeguards against improper disciplinary action" and states that no member shall be disciplined "by such organization or by an officer thereof" unless certain procedural standards are complied with.

Snow was the security director, only an employee of the N.M.U. He was not an officer and was not even a member of the union. Consequently, he cannot be held personally liable under this section, even for an intentional tort since this section specifically applies to the union or "officers" only, not employees. The fact that "employees" were intentionally omitted from this section is buttressed by an analysis of the complete LMRDA. Title II refers to reporting by "labor organizations, officers and employees of labor organizations" and Section 432 and 433 refer specifically to employees. The Congressional

intent clearly was to omit "employees" from any liability under sections 411(a)(2) and/or 411(a)(5).

CONCLUSION

For the aforementioned reasons, the Court below committed error and the judgment in favor of the plaintiff should be reversed and the complaint dismissed as against Charles Snow, or in the alternative, a new trial ordered and/or the judgement of punitive damages against Snow reduced.

Respectfully submitted,

Kenneth J. Finger
Attorney for Defendant-Appellant
Charles Snow

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES MORRISSEY,
Plaintiff- Appellant- Appellee,
0-against-
NATIONAL MARTIME UNION OF AMERICA,
Defendant- Appellant- Appellee,
- against -
JOSEPH CURRAN, WALL AND SNOW
~~Defendants~~
Defendants- Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I. Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 28th *day of* November *1975, deponent served the annexed* Brief

upon HAROLD E. KOHN, P.A. *attorney(s) for*

in this action, at 1700 Market Street, Phil. Pa.

the address designated by said attorney(s) for that purpose by depositing 2 *true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 28th
day of November *19* 75.

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES MORRISSEY,
Plaintiff- Appellant- Appellee,
-against-
NATIONIA L MARTIME UNION,
Defendant- Appellant_ Appellee,
- *against* -
CURRAN, WALL AND SNOW
Defendants- Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 28th *day of* November *19*75 *at* see attached

deponent served the annexed Brief *upon* see attached

the Attorneys *in this action by delivering* 2 *true copy* 5 *thereof to said individual personally. Deponent knew the per on so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 28th *day of* Novmber *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE

FEDER, KASZOVITZ & WEBER
450 Seventh Avenue
New York, New York 10001
(212) 239-4610

BLOOM & EPSTEIN
Attorney for Defendant- Appellant- Wall
110 East 42nd Street
New York, New York 10 017
(212) 687-6050

DUER & TAYLOR
Attorney for Plaintiff- Appellant- Appellee
74 Trinity Place
New York, New York 10006
(212) 944-7482

ABRAHAM E. FREEDMAN
Attorney for Defendant- Appellant- Appellee
346 West 17th Street
New York, New York 10011
(212) 929-8410